IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

TUESDAY, THE EIGHTEENTH DAY OF JANUARY
TWO THOUSAND AND FIVE

PRESENT

THE HON'BLE MR JUSTICE GODA RAGHURAM

WRIT PETITIONS NOs : 20738 & 21080 of 2004

I W.P.NO. 20738 OF 2004 :-

Between:

M/s Karamchand Thapar Bros (CS) Ltd.,

Head Office: Brabourne Road, Kolkatta,

A Public Limited Company regd. under

Indian Companies act, 1956 having its

Branch Office at 66A, R.P Road, Secunderabad,

Rep. by its General Manager, Mr. Vikram Kapoor,

S/o Late M.R. Kapoor, aged about 57 years,

R/o 304, Archana Apartments, Somajiguda,

Hyderabad – 500 082.

..... PETITIONER

AND

1. The A.P. Power Generation Corporation Limited,

Vidyut Soudha, Khairatabad, Hyderabad, rep.by

Superintending Engineer/Generation-II.

2. M/s Anand Transport, a Partnership firm rep.by

its Managing Partner, 9, Dr. Radhakrishna Salai,

Opp: Mylapore, Chennai –4.

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court may be pleased to issue a writ, order or direction more in the nature of Writ of Mandamus by declaring the action of the 1st respondent in accepting the Pre-qualification Bid of the 2nd respondent for award of transportation contract of 5 Lakh MT of Coal from M/s Mahanandi Coal Fields Limited on Free on Rail Talcher basis or alternatively on Free On Board, Paradeep to Rayalaseema Thermal Power Project, Muddanur, Kadapa District as supplied by M/s MCL by rail cum sea cum rail route via Paradeep and Chennai Ports, illegally though 2nd respondent has not fulfilled the prescribed tender conditions as arbitrary, illegal and violative of the Article 14 of the Constitution of India and consequentially direct the 1st respondent to award the contract to the lowest qualified bidder excluding the 2nd respondent.

For the Petitioner: Mr. K.G.K. Prasad, Advocate

For the Respondent No.1: The Advocate General of AP

For the Respondent No.2: Mr. D.Prakash Reddy, Senior Counsel, instructed by Mr. C. Kodandaram, Advocate.

W.P.NO. 21080 OF 2004 :-

Between:

South India Corporation (Agencies) Limited

No.73, Armenian Street, Chennai 600 001, rep by

Its General Manager (Stevedoring), L. Venkataramani,

S/o M. Lakshminarayanan, aged about 44 years,

Residing at Adayar, Chennai – 600 020.

..... PETITIONER

AND

1. Andhra Pradesh Power Generation Corporation Ltd.,(APGENCO)

Vidyut Soudha, Khairatabad, Hyderabad, rep.by its

Superintending Engineer/Generation-II.

2. M/s Anand Transport, a Partnership firm 9,

Dr. Radhakrishnan Salai,Chennai –4, represented

By its Managing Partner.

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court may be pleased to issue an appropriate writ, order or direction more particularly one in the nature of Writ of Mandamus directing the 1st respondent to reject the bid of the 2nd respondent in Tender Specification No. CEG(E5)/06/2004-05 issued by the 1st respondent, and consequently direct the 1st respondent to award the contract under the said Tender Specification to the petitioner as the lowest qualified bidder.

For the Petitioner: Smt. Nalini Chidambaram, Senior Counsel, instructed by Mr. K.Gopal Choudary, Advocate

For the Respondent No.1: The Advocate General of AP

For the Respondent No.2: Mr. D.Prakash Reddy, Senior Counsel, instructed by Mr. C. Kodandaram, Advocate.

The Court Made the Following :

:: ORDER ::

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These two writ petitions filed by M/s Karamchand Thapar Brothers (CS) Ltd., and South India Corporation (Agencies) Ltd., seek a substantially similar relief viz., a declaration that the action of the 1st respondent-Corporation accepting the pre-qualification bid (PQB) of the 2nd respondent for award of the transportation contract of 5 lakhs Metric Tons of coal from Mahanadi Coal Fields Ltd., (MCL) on either Free On Rail Talchar (FOR) basis or Free On Board (FOB) Paradip basis to the Rayalseema Thermal Power Project (RTPP) at Muddanur is illegal, since the 2nd respondent is not qualified *qua* the tender conditions. While in WP No. 20738/2004 the petitioner seeks a consequential direction to the 1st respondent to award the contract to the lowest bidder excluding the allegedly unqualified 2nd respondent, the petitioner in WP No. 21080/2004 seeks a direction to the 1st respondent to award the contract to him on the ground that he is the lowest qualified bidder. In view of the

commonality of the issues involved and presented for adjudication, the writ petitions are heard together and taken up for disposal by this common order.

Heard Mr. K.G.K. Prasad, learned counsel for the petitioner (WP No.20738/04), Mr. K.Gopal Chowdary, learned counsel for the petitioner instructing Smt. Nalini Chidambaram, Senior Counsel (WP No. 21080/04), the Advocate General for Andhra Pradesh for the 1st respondent-Corporation, Mr. D.Prakash Reddy, Senior Counsel instructed by Mr. C.Kodandaram, learned counsel for the 2nd petitioner in both the writ petitions and Mr. S. Ravi, learned counsel for the 3rd respondent (WP No. 21080/04).

On 30.7.2004 the 1st respondent issued a notification in respect of tender specification No. CEG (E5) 06/2004-2005 inviting tenders in two part bids for transport of 9.00 lakh MT of coal from M/s MCL to RTPP on "FOR" Talcher basis or alternately "FOB" Paradip port basis by rail cum sea cum rail route via Paradip and Chennai. The tenders are required to be submitted in two distinct parts – part-I the pre-qualification bid and Part-II the price bid. On 26.8.2004 the 1st respondent issued an amendment to the notification dt 30.7.2004 reducing the quantity of coal to 5.00 lakh MT. This notification also set out eligibility criteria to be fulfilled by persons desirous of responding to the tender notification, which being relevant is extracted hereunder:

"Eligibility Criteria:

> *Those who are having previous experience of handling similar work of such large magnitude at the rate of minimum 4.00 lakhs MT of coal per annum on his own and also having experience in liasoning with collieries are eligible to quote. In addition to the above, tenderer shall be in possession of necessary license from port and other authorities for stevedoring work at least one of the Ports i.e., Chennai/Paradip and the contractor should have working arrangements with listed stevedores for carrying out the remaining work if any. The bidder shall produce solvency certificate for Rs.6.00 crores."*

The time and date for receipt of the tenders and for opening of the PQB specified in the notification dt 30.7.2004, was altered and eventually specified as 3 pm, on 25.9.2004 and 4 pm on 25.9.2004, respectively.

Specifications, Terms and Conditions of the Tender:-

a. Intending tenderers were required, a requirement exemplified by the tender document, to submit their bids in two parts – (I) Pre-qualification Bid and (ii) Price Bid. Both bid components to be submitted separately and in sealed covers.

b. As per the tender specification and instructions therein the PQB includes furnishing the details of work of similar type and magnitude carried out by the tenderer in the Schedule-I format.

c. As per the PQB requirement set out in the tender specification the scope of the work under the two options (part-I and part-II) is specified as under:

" Option – I: ON "FOR" TALCHER BASIS

i) Transportation of cal from M/s MCL,Talcher to Paradip port by rail.

ii)Handling and loading of coal in to ships at Paradip port.

iii)Transportation of coal from Paradip port to Chennai port by ship.

iv)Handling and reloading of coal in to railway wagons at Chennai port/Korukkupeta G.S. for onward movement to Rayalaseema Thermal Power Station, Muddanur, Cuddapah Dist. (AP) by rail.

Option – II: ON 'F.O.B.' PARADIP PORT BASIS

i) Transportation of coal from Paradip port to Chennai port by ship.

ii) Handling and reloading of coal in to railwayf wagons at CHENNI PORT/KORUKKUPETA G.S. for onwards movement to Rayalaseema Thermal Power Station, Muddanur, Cuddapah Dist (AP) by rail. "

d. Clause-2 of the PQB requirements specifies that Part-I called 'PQB' should contain *inter alia* the financial standing and record of previous experience.

e. Clause-6 of the PQB requirements reads as under:

" Prequalification bid will be opened first to check whether qualification, experience and other requirements are adequate for opening of Price bid (Part-II). Only those tenders which contain the full information and which comply with the requirements regarding technical and financial qualifications, experience and equipment will be considered. Not withstanding anything stated above the APGENCO reserves the right to assess the tenderer's capacity to perform the contract, should the circumstances warrant such assessment in the overall interest of the APEGENCO. In this regard the

decision of the Corporation is final."

f. Clause-10 of the PQB requirements reiterates the eligibility criteria, specified in the 1st respondent's revised notification dt 26.8.2004 (extracted supra). In addition Clause-10 specifies - "the tenderer shall enclose the experience certificates, performance reports and solvency certificate to the pre qualification bid (Part-I)". Clause-11 sets out the other documents that need to accompany the PQB and specifies that a tender received without these certificates is liable for rejection.

g. The information required to be furnished as annexures to the PQB is specified in Clause-12, which includes details of coal handled at ports per annum portwise and yearwise; infrastructure facilities available with the contractor at ports and collieries; as well as experience in handling coal – source wise and monitoring dispatches of coal and liaison with collieries.

h. Clause-11 of the 'Important Instructions to the Tenderers" in the tender specification contains the usual caveat that the 1st respondent reserves the right to reject all or any of the tenders without assigning any reasons whatsoever. This liberty of the 1st respondent is reiterated in Clause-1 Section-I of the "Special Terms and Conditions" of the tender specification.

i. The detailed scope of the contract under both the options is specified in Section-II of the tender specification. In so far as 'FOR TALCHER BASIS' option is concerned the detailed scope of the contract is set out in sub-sec.II (A),(B)and(C). Under this option, *inter alia*, the contract involves follow up with various agencies viz., Coal Controller, Railways and Coal fields, of all works relating to the execution of linkages by the respective collieries through Paradip port; monitoring loading of coal at the pit heads and lodging complaints with the respective authorities in case of any deficiency.

j. Para 2.8.1 in sub-section-II(C) of the special terms and conditions (under both options) requires the contractor to monitor loading of coal at the pitheads; supervising loading into wagons and bringing to the notice of the concerned any deficiency either by way of short loading or by way of

loading of stones, shale and extraneous materials. In addition, under this clause the contractor is required to report any shortfalls in the program of loading by the collieries and is also required to take up with the concerned authorities any bottlenecks in the loading or transporting of coal either from pithead to railway siding or from railway siding to destination, for want of adequate wagons. He is also required to send daily loading advice from the collieries to the 1st respondent.

(3) Five persons including the writ petitioners, the 2nd respondent in the writ petitions and the 3rd respondent in WP No. 21080/04 submitted their bids within the stipulated time. The bids were opened on 25.9.2004 and the contents of the accompanying documents in the respective PQBs were read out by the officers of the 1st respondent.

(4) Contending that the 2nd respondent did not qualify as per the information furnished in its in PQB, W.P. No. 20738 of 2004 was filed on 9.11.2004, assailing the acceptance of the 2nd respondent's PQB by the 1st respondent. On 17.11.2004 WP No. 21080 of 2004 was filed. The petitioners herein challenge the eligibility of the 2nd respondent. In brief the contention in WP No. 21080/2004 is that the colliery experience certificate furnished by the 2nd respondent from M/s Kamal Wineries does not contain information as to the volume, periods or the scope and extent of the colliery experience; that the coal requirements of M/s Kamal Wineries is of a very small quantity; that transportation is by road; that a certificate from M/s India Cements Ltd., regarding the liasoning experience with collieries of the 2nd respondent is vague and does not specify the volume of work. This petitioner further pleads that the movement of coal for M/s India Cements Ltd., is substantially by road and not by rail and the requirement is only about 2 lakhs MT by road and a very small quantity by rail. The petitioner has also urged that the document issued by M/s India Cements Ltd in favour of the 2nd respondent is not genuine. Another substantial objection of the petitioner is that the 2nd respondent has not incurred rail-sea-rail experience with regard to the specified minimum quantity of 4 lakhs MT of coal per annum.

(5) The petitioner (WP No.21080/04) impeaches the qualification and eligibility of the 2nd respondent on the following grounds (extracted to the extent relevant):

A. *It is submitted that the bid submitted by the 2nd respondent ought to have been rejected at the pre-qualification stage itself as the 2nd respondent had not satisfied the criteria and requirements for pre-qualification set out in the bid documents. It is submitted that the criteriaand requirements set out in the bid documents are binding on the 1st respondent and the 1st respondent can only consider the duly qualified bidders who satisfy all the pre-qualification requirements for the award of the contract.*

B. *It is submitted that the tender conditions are very clear and that the eligible bidder should have previous experience of handing similar work of such large magnitudes. It is submitted that the eligible bidder should have performed, as an integrated scope of work, the liasioning at collieries, the transportation by rail, hire vessels themselves for transport of such volumes by sea, unload at discharge port, arrange for rail movement after discharge and load for delivery to the thermal power station. Further more, such an integrated scope of work should be for at least the specified minimum 4 lakh MT per month.*

C. *The 2nd respondent does not have any experience in doing an integrated contract for the transport of thermal coal under the Rail-cum-Sea-cum-Rail route. The 2nd respondent has only some experience in unloading coal and handing it locally within the port. The 2nd respondent was not even considered by the 1st respondent as deserving of even being issued tender documents for a much smaller contract for a much smaller and limited scope of work in the tender for VRPS opened on 10.1.2004; and therefore it is irrational and unreasonable to consider that the 2nd respondent could be qualified for this tender. The documents submitted bythe 2nd respondent to show pre-qualification experience were vague, false or misleading and the 1st respondent ought to have made the necessary inquiries with due diligence and ascertained the truth of the matter and rejected the bid of the 2nd respondent. The 2nd respondent has not done any transport of coal by sea. The 2nd respondent has no valid collieries experience. The 2nd respondent has no valid integrated contract experience of the nature and magnitude called for in this tender. The 2nd respondent's bid ought to have been rejected at the pre-qualification stage itself by the 1st respondent.*

D. *It is submitted that the 1st respondent, has violated the sanctity of the tender process by asking the 2nd respondent, and allowing the 2nd respondent, to furnish further documents to establish pre-*

qualification after the bid opening. It is submitted that the documents submitted on the date of the opening of the tender alone are to be considered for the purpose of pre-qualification and, if the documents submitted by the 2nd respondent originally at that time do not satisfy the required pre-qualification criteria, that tender ought to have been rejected outright. At best, clarification may be asked on the documents already submitted by them; but no new or further documents could have been lawfully asked for or accepted by the 1st respondent. It is submitted that the very action of the 1st respondent in asking and/or allowing the 2nd respondent to furnish further or better qualifying documents and/or accepting and considering any further documents submitted by the 2nd respondent after the date of opening of the tender is arbitrary, discriminatory, unreasonable, not bona fide or fair or just and violative of Article 14 of the Constitution of India."

(6) Earlier on 10.11.2004 this court while directing that the miscellaneous application be listed on 16.11.2004, permitted the 1st respondent to process the tender while directing that the same be not finalised. On the same day the price bids of 4 of the tenderers ie., the two petitioners, the 2nd respondent and the 3rd respondent (WP No. 21080/04) were opened.

(7) Earlier on 28.9.2004 (the 3rd Respondent in WP No.21080/04) addressed a letter to the 1st respondent stating that the proof of colliery experience submitted by the 2nd respondent on the basis of the two letters of M/s Kamal Wineries, Hyderabad, and M/s India Cement ltd., Chennai, did not contain satisfactory information regarding the eligibility of the 2nd respondent. This letter stated that the certificates did not mention the quantity, period and actual type of work, that the letter was not in conformity with the PQB requirements regarding the monitoring, loading, supervision and liasoning at collieries and that the bid of the 2nd respondent should therefore be eschewed. Later on 9.11.2004 (before the opening of the price bids) the petitioner (WP No. 21080/04) addressed the Chief Engineer of the 1st respondent alleging disqualification of the 2nd respondent. This letter reads as under:

"We have received a communication from you that the price bid for the tender specification No. CEG(E5)06/2004-05 is slotted for opening on the 10th November 2004. We reliably learnt that the technical bid of Anand Transport, Chennai who are

totally an ineligible tenderer has been accepted by APGENCO and their price bid is also being opened tomorrow. We are shocked and surprised that the tender of Anand Transport who does not fulfil most of the tender conditions has been accepted by APGENCO. We had utmost faith that your organisation would be fair and upright in finalising all tenders and we have not bothered to lodge any protest against any tenderer even though we noticed several infirmities in the documents submitted by a few tenderers. As far as Anand Transport is concerned, it was pointed out during the tender opening itself that the certificates enclosed by them towards handling of thermal coal and also towards colliery experience were totally inadequate. As far as handling of thermal coal is concerned, we understand that as the document submitted by them were not sufficient they have submitted documents subsequent to opening of technical bid to show their qualification for loading to ships. We understand they have produced a certificate for having carried out this work for several lakh tones in Vizag Port for the period December 1997 to January 2001. We wish to inform you that we were the only handling agents appointed by Tamil Nadu Electricity Board for carrying out work for them during this period. Anand Transport has been one of our sub-contractor who was performing only part of the handling contract. Hence their experience is not as a direct contractor and only as a sub-contractor that too not for entire scope of work but only a portion of the work involved. We have now enclosed a letter from Vizag Port which will show that Anand Transport were only our sub-contractor. Your tender document is very clear that parties who have carried out work of similar nature and magnitude alone will be considered. Jobs performed as a sub-contractor shall not be acceptable in any tender process. You can see from our records that we have obtained certificates from TNEB for the quantity handled through Vizag Port during the years specified. Thus for the same job done, is APGENCO going to qualify both us as well as Anand Transport? Anand Transport being a sub-contractor cannot be found to be eligible.

Further as they have not submitted all the documents along with the technical bid, any decision now being taken based on documents submitted by them subsequent to the tender opening is not fair.

We noticed that they have produced insufficient certificates to prove experience in liaisoning at pitheads/colliery. The certificate submitted by them are very vague and does not show any volume of business etc. If APGENCO has sought further certificates from them and a decision was taken based on the subsequent documents, such practice is not followed in normal tender procedures not only by APGENCO but also by any Government undertakings/public utilities. It is apparent that Anand Transport has a close link with India Cements who has issued them certificates which do not represent the correct position. We reliably learn that "Balaji Transport Agency, 6-3-883/15/A Jaffer Ali Bagh, Somajiguda, Hyderabad – 500 082" was the coal agents for India Cements (their group companies) for all these years. The records available with mines and railways show this name only. In our opinion the technical bid of Anand Transport has to be rejected without any furtherinvestigation as the documents submitted at the time of tender opening (documents submitted after tender opening should not be considered at all) do not

show that they have relevant experience and qualifying requirement similar to the scope of work given in the tender document. If at all APGENCO wants to carry out further investigation, the same should be done by writing to Singareni Colliery/Railways and Vizag port Trust authorities and not to parties who have issued the certificates in a very vague manner. Unless such investigation is carried out and their bid is rejected, the price bid of Anand Transport should not be opened at all.

We regret very much for writing this letter as we were all along keeping quite because we were confident that APGENCO will be transparent and fair in finalizing the tenders based on the documents submitted by parties without seeking additional documents etc. It is common knowledge that as far as pre-qualification is concerned no additional documents are encouraged in such large tenders. However, as we were shocked and surprised to learnt that the document submitted by Anand Transport has been accepted and found fulfilling the tender conditions (which really is nor right) we wanted to point out these deficiencies for corrective action by you. Even though the opening of price bid has been fixed tomorrow, we are sure it is not very late to disqualify the party and open only the bids of parties who are fully eligible."

(8) Presumably in response to the 3rd respondent's (WP No.21080/04) letter dt 28.9.2004 wherein the 2nd respondent's experience and qualification was questioned, the 1st respondent addressed a Fax on 16.10.2004 to the 2nd respondent calling upon it to furnish documentary evidence if any regarding the experience of the 2nd respondent in respect of loading of coal into ships and transportation of the coal by ships. The apparent reason for this is stated in the communication to be that the 2nd respondent had submitted experience certificate related only to handling of coal at various ports. Though the letter dt 28.9.2004 had also alleged that the 2nd respondent had no experience in collieries liasoning, the 1st respondent's Fax message dt 16.10.2004 did not call upon the 2nd respondent to furnish any documentary evidence on this aspect of the 2nd respondent's experience.

(9) On the opening of the price bids on 10.11.2004, the bid of the 2nd respondent was seen to be the lowest, at Rs.915.84 per MT. The price bid of the petitioners and the 3rd respondent (WP No.21080/04) are – petitioner in WP 21080/04 Rs.1087.37 per MT; 3rd respondent (WP No.21080/04) Rs.1125.49 per MT and petitioner in WP No.20738/04 Rs.1148.99 per MT.

Response of the 1st respondent:-

The 1st respondent-Corporation has filed counter affidavits which contain substantially similar averments. According to this respondent, 5 tenders were received within the time stipulated, the PQBs were opened and all tenderers who were pre-qualified were intimated by the answering respondent's letter dated 8.11.2004, that the price bids would be opened on 10.11.2004. The petitioners and the party respondents were found qualified in the pre qualification round and the price bids of all pre-qualified tenderers were opened as scheduled on 10.11.2004. Responding to the allegation that the 2nd respondent was not qualified for consideration of his price bid, this respondent denies this allegation. It is contended that the certificates submitted by the 2nd respondent issued by M/s Kamal Wineries Ltd., Hyderabad and BELSHIPS (to the effect that the 2nd respondent is their agent and has the experience in chartering matters) were not taken into consideration as they were not necessary in accordance with the condition laid down for PQB. In response to the allegation regarding the 2nd respondent's qualification, the answering respondent states in para-8 (WP 21080/04) that the 2nd respondent had produced 8 specified certificates issued by the Director (R&P), Visakhapatnam Port Trust; by the Traffic Manager Visakhapatnam Port Trust; by the General Manager (Ports) Poompuhar Shipping Corporation Ltd., by the Visakhapatnam Steel Plant; by Jindal Vijayanagar Steel Ltd; by Mormugao Port Trust and by the Chennai Port Trust. It is further contended by this respondent that on evaluation of the certificates produced by the tenderers (in the PQB) wherever any doubt was entertained it requested the concerned person who issued the certificate to confirm about the issuance. Pursuant to such request by the answering respondent the Director (R&P) Visakhapatnam Port Trust and the General Manager (Ports) Poompuhar Shipping Corporation Ltd. And the General Manager (Material), India Cements Ltd., had confirmed through their letters dated 13.10.2004, 1.11.2004 and 1.11.2004 respectively, about the genuineness of the certificates issued by them. It is further contended that at the time of evaluation of PQBs, the answering respondent noticed that the 2nd respondent and another tenderer M/s Chettinad Logistics Pvt. Ltd., did not furnish documentary evidence regarding their experience in loading of coal into ships and transportation by ships. Therefore, this respondent addressed a letter to both these tenderers to furnish documentary evidence if any regarding their

experience in loading of coal into ships and transportation. Pursuant to such a communication the 2nd respondent submitted certificates regarding its experience issued by Poompuhar Shipping Corporation Ltd., vide letter dated 1.11.2004. Responding to the allegation that the 2nd respondent did not qualify in the PQB as it was a sub-contractor of the petitioner (WP 21080/04), the 1st respondent asserts that the fact that one of the tenderers was a sub-contractor to another does not *ipso facto* disqualify such a tenderer from being considered. From the certificates issued by the Visakhapatnam Port Trust, the 1st respondent was satisfied that the entire quantities during the period 1997 to 2001 were handled by the 2nd respondent and this fact was also confirmed by the Visakhapatnam Port Trust by its letter dated 13.10.2004. The 1st respondent asserts that it is entitled to seek information or clarification in the process of technical evaluation from the bidders, on technical issues. The 1st respondent has in the counter, set out facts relating to the opening of price bids on 10.11.2004, the price bid quotations of the various tenderers who are parties in these two writ petitions and that on opening of the price bids, the 2nd respondent's bid was found to be the lowest and that of the petitioner (WP 21080/04) the second lowest. It is also stated that the difference between the lowest and the next lowest bids when calculated for the 5 lakhs MTs quantity comes to over Rs.8.57 crores, which is a huge amount which the 1st respondent a State instrumentality can ill-afford to squander. The 1st respondent also pleads that the 3rd respondent (WP 21080/04) by its letter dated 5.11.2044 had set out objections asserting that the 2nd respondent had not fulfilled the conditions for PQB. These were considered by the Board of the 1st respondent at a meeting held on 6.11.2004 and after thorough consideration the Board decided to qualify the 2nd respondent in the PQB and accordingly the 2nd respondent's price bid was considered along with those of the other qualified tenderers. With regard to M/s South India Corporation Ltd., the 1st respondent states that it

> *" was the previous contractor transporting of coal at the rate of Rs.9116.39 per MT. The 1st respondent Corporation by its letter dated 4.10.2004 requested M/s South India Corporation Ltd., to transport 1 lakh MT of coal at the old rate in public interest, as there is dire necessity for the coal at the project and keeping the time requirement for opening and finalisation of tenders. But the said company refused to do so on the ground that the rate will not be worked out for them in the presence scenario vide their letter dated 25.10.2004.*

Having said so, in its letter dated 25.0.2004, the same Company by its letter dated 10.11.2004 agreed to transport at the old rate itself after coming to know about the rate quoted by the 2nd respondent herein i.e., Rs. 915.84. This itself clearly shows that the rate quoted by other three companies is far higher than the normal rates and the same is detrimental to the interests of the Corporation/Public interest."

The 1st respondent also alleges that the petitioners and the 3rd respondent (WP 21080/04) have formed a cartel and that this respondent received a FAX message dated 16.10.2004 from the Traffic Manager, Paradeep Port Trust, from which it could be inferred that the work was awarded to M/s South India Corporation Ltd., Chennai, but was sub-let to M/s Karamchand Thapar Bros. (CS) Ltd., without the written permission from the answering respondent and in violation of the terms and conditions of the contract (vide Para-20 of the counter in WP 21080/04). This respondent concludes by asserting that it has rationally evaluated the PQBs and as such there was no justification for interference with such decision making process by this court particularly as an appellate scrutiny over such evaluation by the 1st respondent.

Response of the 2nd respondent:-

The 2nd respondent has also filed counter affidavits denying the allegations in the writ petitions and asserting that it is qualified to tender in accordance with the eligibility criteria. With regard to certificates submitted by it issued by M/s Kamal Wineries and M/s India Cements Ltd., the 2nd respondent asserts that these certificates were part of the experience certificates issued by various parties and submitted to the 1st respondent and that the 1st respondent had evaluated its PQB on an over all analysis of the certificates submitted and not merely on the basis of the 2 certificates above. With regard to its experience, in Para-11 of its counter affidavit (WP 21080/04) the 2nd respondent pleads as under:

"11. I submit that the 2nd respondent submitted documentary proof in respect of chartering experience and sea transportation of coal of 4.00 lakhs MT from M/s Poompuhar shipping Corporation, Chennai a Tamilnadu Government Enterprises, and from M/s India Cements Ltd., in addition to this the certificate from M/s Bel Ships to whom the 2nd respondent rendering service on account of chartering of vessels. Further the 2nd respondent also submitted certificates

from the vessel owner M/s Western Bulk Carriers whose vessels were chartered by the 2nd respondent. The 2nd respondent has already submitted requisite documents from traffic manager, Visakhapatnam Port Trust in respect of coal loaded in the vessels as Stevedoring agent at Vizag for the period from 1997-2001. In respect of unloading of coal from the vessels this respondent submitted documentary proof from public sector industry M/s Visakha Steel Plant and from Private Sector industry M/s Jindal Vijayanagar Steel Ltd., having handled millions of tons. The allegations of the petitioner that the coal was transported by road only for M/s Kamal Wineries and for M/s India Cements Ltd., the documents by this respondent certified the above said two companies are very vague and does not disclose any quantity are hereby denied and this respondent is unable to understand how the petitioner could make such bald and baseless allegations without any iota of evidence in support of its allegations."

Responding to the allegation relating to the comments passed against the 2nd respondent by this court W.P. No. 25356 of 2003, it is stated by the 2nd respondent that these comments have no nexus with the eligibility or entitlement of 2nd respondent in relation to the present tender. In substance the 2nd respondent contends that it is fully eligible and qualified for participating in the tender and that the action of the 1st respondent in considering the 2nd respondent as qualified and in opening its price bid after the PQB stage, is not vitiated by any error.

On behalf of the 1st respondent a copy of the minutes of 39th Board Meeting dated 6.11.2004 were filed for the perusal of this court. These minutes record that the objections of one of the tenderers i.e., 3rd respondent (WP 21080/04) contained in its letter dated 5.11.2004 were considered by the Board of the 1st respondent. The Board examined the copies of the experience certificates furnished by the 2nd respondent and expressed its total satisfaction regarding the experience, technical qualifications and eligibility of the 2nd respondent and decided to qualify 4 of the tenderers (who are parties in these writ petitions) as they fully satisfied the prescribed conditions as specified in the tender specification. The Board accordingly authorised the Chief Engineer of the 1st respondent to process the matter further.

The principal objections as to the eligibility of the 2nd respondent, as asserted by the petitioners are as under:

a. The 2nd respondent has no colliery liasoning experience;

b. The 2nd respondent has no integrated rail-cum-sea-cum-rail prior experience of such large magnitude;

c. The 2nd respondent was a sub-contractor of the petitioner (WP 21080/04) in respect of the Visakhapatnam Port Trust work and therefore the VPT's certificate dated 19.10.2004 does not tantamount to qualification of the 2nd respondent for the tender in question;

d. The Poompuhar Shipping Corporation Ltd.,'s certificate dated 18.10.2004 only certifies that the 2nd respondent acted as an agent on behalf of M/s Western Bulk Carriers, Oslo (ship owners), for offering the ship on charter where the charterer was the Corporation itself and therefore the 2nd respondent did not have the experience in transport of coal by ships and thus the eligibility to tender.

The petitioners are also aggrieved that the 1st respondent-Corporation despite the petitioners' objections regarding the 2nd respondent's lack of colliery experience, has failed to address this issue nor has even called upon the 2nd respondent to furnish details of proof of 2nd respondent's colliery liasoning experience.

In fact M/s South India Corporation Ltd (R3 in WP 21080/04) in its letter dated 28.9.2004 addressed to the 1st respondent, had complained that the certificates issued by m/s Kamal Wineries and M/s India Cements Ltd, Chennai do not disclose the colliery liasoning experince of the 2nd respondent as these certificates do not mention the quantity, period and actual type of work; that the 2nd respondent does not have any loading port experience of wagon unloading, port handling and loading into the ship; that it has not produced any certificate regarding loading port experience and that the 2nd respondent does not have any "experience in colliery liasoning, loading port and shipping".

The certificates issued by the Director (R&P), Visakhapatnam Port Trust, dated 12.10.2001; by the Deputy Chief Manager (T&S) Visakhapatnam Steel Plant; by Jindal Vijayanagar Steel Ltd, dated 12.8.2004; by the Traffic Manager, Mormugao Port Trust, dated 13.8.2004; by the Chennai Port Trust, dated 18.8.2004; *prima facie* disclose that the 2nd respondent has the experience of handling coal and transport

of coal from wharf to stackyard as also loading into railway wagons and handling and stevedoring experience including transport of coal from ship to railway wagons. These certificates also disclose experience of the 2nd respondent in transporting coal by road and in chartering on vessels. The other certificates received by the 1st respondent from the Visakhapatnam Port Trust, dated 19.10.2004 and from Poompuhar Shipping Corporation Ltd., dated 18.10.2004, though received after the date of opening of the PQB and received by the 1st respondent pursuant to the clarification sought by it, certify the stevedoring experience of the 2nd respondent and regarding loading of coal on to vessels. The quantum of the coal handled as set out in some of the certificates is in conformity with the experience quotient prescribed in the tender specifications. The Visakhapatnam Port Trust certificate submitted along with PQB dated 12.10.2001 as well as the certificate of the Visakhapatnam Port Trust dated 19.10.2004 submitted by the 2nd respondent after the opening of PQB, in response to the 1st respondent's directive to the 2nd respondent for further particulars, certify that the 2nd respondent had stevedoring experience of handling thermal coal at the Visakhapatnam Port Trust. The words 'stevedoring' as defined in Strouds Legal Dictionary, Wharton's Law Lexicon, Jowitt's Dictionary means "a person employed, to stow cargo on board a ship, to load and unload a ship and a person whose duty it is to undertake stowage or discharge of cargos with a gang of men whom he hired pale and his responsible for their work". These definitions of the expression 'stevedore' have been noticed in the decision of a learned single Judge by the Calcutta High Court in ***Kesab Lal Banerjee vs Calcutta Dock Labour Board and another()***. These certificates could therefore be considered as having provided rational justification for the 1st respondent's satisfaction as to the experience of the 2nd respondent in respect of loading and unloading at ports.

In the circumstances the satisfaction arrived at by the 1st respondent with regard to the qualification of the 2nd respondent to tender and for crossing the PQB threshold, on this aspect of the experience requirement, does not suffer from any perversity or arbitrariness in the evaluation and decision making process.

In the PQB requirements set out in the tender specifications, in Clause-6 the 1st respondent has specifically preserved to itself the right to assess a tenderer's

capacity to perform the contract should the circumstances warrant such an assessment in the over all interests of the Corporation, notwithstanding the other requirements of submission of PQBs. In the circumstances and in the context of such power preserved to itself by the 1st respondent, the calling for further information regarding the coal handling (loading and transportation by ships) experience of the 2nd respondent cannot be characterised either as arbitrary or contrary to the tender specification norms.

It must be recognised that substantive compliance with the fundamental requirements of the instructions regarding the processing of tenders is all that need be ensured. None of the tender specifications should be so construed, as to disable a public authority from getting the most competitive bid, by resort to a hyper technical and excessively restrictive interpretation of the tender guidelines. Tender guidelines are intended to express the broad technical requirements in relation to the contract in question. These instructions are intended to subserve the need of economical and efficient execution of public works and to limit and define the discretion of the authorities of the State in the mater of granting largesse by way of public contracts. The contention of the petitioners that the 1st respondent has transgressed the conditions of tender specifications in calling for further information regarding the qualification of the 2nd respondent, does not therefore commend acceptance of this court.

Responding to the other objection that the 2nd respondent was not qualified to tender as he was merely a sub-contractor of the petitioner (WP No.21080/04) in respect of a contract with the Tamil Nadu State Electricity Board executed by this petitioner, the 1st respondent in its counter has put forth a defence that the fact that one of the tenderers is a sub-contractor of another does not *ipso facto* disqualify such tender from being considered. According to the 1st respondent the certificates issued by the Visakhapatnam Port Trust show that the entire quantity during the period 1997-2001 was handled by the 2nd respondent and this was confirmed by the Visakhapatnam Port Trust by its letter dated 13.10.2004. The “eligibility criteria” of the contract in question *inter alia* require the intending bidders to have previous experience of handling similar work of such large magnitude and at a minimum of 4

lakhs MT of coal per annum. The 2nd respondent admits to have executed the TNEB work for the petitioner in WP No. 21080/04 but contends the work was executed by the 2nd respondent itself though on behalf of this petitioner. Nothing in the "eligibility criteria" or in other terms of the tender specifications disentitles a sub-contractor to tender if such tenderer has the requisite experience. There is nothing sacrosanct about being either the main contractor or a sub-contractor *vis-a-vis* the requisite experience that is required for execution of the present contract. In substance what the "eligibility criteria" prescribe is that the intending tenderer should have previous experience of handling similar work with a specified minimum quantity, in respect of transportation of coal. Whether such experience is acquired either as a principal contractor or as a sub-contractor, matters not. It may have been relevant if the 2nd respondent was a mere employee of the petitioner in WP No. 21080/04 in respect of the TNEB contract. In such an event it could perhaps be successfully contended by the petitioner that the 2nd respondent had no experience as it executed the work under the instructions and control of the petitioner. There is neither such a plea nor evidence on record to infer that the 2nd respondent had no experience of handling the TNEB work at the Visakhapatnam Port Trust. Apart from this there are other documents evidencing the experience of the 2nd respondent in respect of transportation of coal such as the certificate issued by M/s Poompuhar Shipping Corporation Ltd., as well as the certificate issued by the Visakhapatnam Steel Plant and Jindal Vijayanagar Steels Ltd. This contention does not therefore merit acceptance by this court.

Another contention is regarding the Poompuhar certificate dated 18.10.2004. The objection of the petitioner in this respect is that this certificate of Poompuhar only certifies that the 2nd respondent acted as an agent on behalf of M/s Western Bulk Carriers, Oslo (ship owners) to offer carriers to Poompuhar, in the transportation of thermal coal for TNEB and therefore the 2nd respondent did not have experience of carrying coal by ship. The "eligibility criteria" do not require the tenderer to own or have a current lease of a ship or other carrier. It requires experience of transportation of coal by sea and if the 1st respondent was satisfied on the basis of the Poompuhar certificate that the 2nd respondent was so qualified, this court would defer to the expert assessment of the 1st respondent in this behalf and would not venture into an appellate scrutiny of such assessment.

Yet another objection of the petitioner is that the 2nd respondent does not have an integrated rail-cum-sea-cum-rail experience. In the considered view of this court it is not necessary for any of the tenderers *qua* the "eligibility criteria" to have prior integrated experience, in a single contract. If a tenderer has experience in the various components of transportation of coal from the collieries by road to port, stevedoring experience, experience of transportation by sea and by road, though in several or distinct contracts, the 1st respondent could legitimately be satisfied that such tenderer is qualified to cross the threshold of PQB. In this area too the administrative construction of the terms and the expert assessment of the 1st respondent deserves deference by this court to its own assessment.

The remaining objection of the petitioners and of the 3rd respondent (WP No. 21080/04) is to the lack of colliery liasoning experience of the 2nd respondent. The grievance of the petitioner in this regard is two fold: Firstly that the 2nd respondent has neither the colliery liasoning experience nor experience of any specified magnitude in this area and Secondly that despite the petitioner's objections in this regard the 1st respondent failed to address this issue and has also failed even to call the 2nd respondent to furnish proof of its experience in this area.

The "eligibility criteria" as set out in 1st respondent's notification dated 26.8.2004 as well as the requisite experience criterion set out in Cl.10 of the PQB requirements in the tender specification require that an intending tenderer should also "have experience in liasoning with collieries". Experience in liasoning with collieries is thus specified to be an additional experience eligibility to bid for the contract in question.

The 3rd respondent (WP No.21080/04) in its letter dated 28.9.2004 to the 1st respondent, objected to the 2nd respondent's liasoning experience on the ground that the letters of M/s Kamal Wineries and Indian Cements Lt., Chennai do not specify the quantity, period and actual type of work executed by the 2nd respondent to establish its liasoning experience with collieries and therefore the 2nd respondent was not qualified to bid.

The petitioner (WP No.21080/04) addressed a letter dated 9.10.2004 setting out objections as to the eligibility of the 2nd respondent. *Inter alia* this communication

stated that this petitioner had pointed out to the 1st respondent even at the time of opening of the PQB that the 2nd respondent had no colliery experience. In the same letter this petitioner reiterated this objection that the 2nd respondent produced certificates which do not establish this experience in liasoning at pithead/colliery and that the certificates submitted by the 2nd respondent is vague and does not disclose the volume of business undertaken. With regard to the certificate of India Cements in favour of the 2nd respondent this letter of the petitioner asserted that there was a close nexus between India Cements and the 2nd respondent and that India Cements had issued them certificates which do not represent the correct position and that the representationist learns reliably that one Balaji Transport Agency of Somajiguda, Hyderabad, was a coal agent of India Cements all through and that the records available with Mines and Railways Departments disclose only the name of Balaji Transport Agency.

In its FAX message dated 16.10.2004 the 1st respondent had called upon the 2nd respondent to furnish documentary evidence for its experience in loading of coal into ships and transportation of coal by ships. The 1st respondent did not call for any clarification or documentary evidence from the 2nd respondent in respect of its colliery liasoning experience. In its counter affidavit the 1st respondent asserts that though the 2nd respondent submitted certificates issued by M/s Kamal Wineries, Hyderabad and M/s BELSHIPS to the effect that the 2nd respondent is their agent and that the 2nd respondent has the experience in chartering matters, the 1st respondent did not take into consideration the said qualification for PQB of the 2nd respondent “as it is not necessary in accordance with the conditions laid down for PQB”. The stand of the 1st respondent is further that its Board at its 39th meeting held on 6.11.12004 considered the eligibility of the 2nd respondent, in particular in the light of the representation dated 5.11.2004 of the 3rd respondent (WP No.21080/04) and had decided that the issues raised by this respondent are incorrect. The Board of the 1st respondent had also examined the copies of the experience certificates furnished by the 2nd respondent and concluded and recorded its satisfaction about the 2nd respondent’s experience as to the technical qualifications and eligibility and accordingly the Board decided to qualify the 4

tenderers, (who are parties in these writ petitions).

The 2nd respondent pleads that the certificates issued by M/s Kamal Wineries and India Cements Ltd., were some of the experience certificates issued by various authorities and submitted by it to the 1st respondent and were not the only certificates on whose basis the 1st respondent had evaluated the eligibility of the 2nd respondent to execute the work. According to the 2nd respondent, the 1st respondent had evaluated the over all experience, expertise and financial capability of this respondent and was satisfied that it was qualified to bid and to cross the PQB stage. It is further the case of the 2nd respondent that even if there was some element of shortfall with respect to its experience, the 1st respondent was entitled to allow its participation in the process, after satisfying itself of the over all capability of the 2nd respondent if such action is in the interest and for the benefit of the organisation (R-1). In view of condition-6 of the PQB conditions this power (discretion?) is available to the 1st respondent, is the substance of the 2nd respondent's defence, in this regard.

Inter alia, the 2nd respondent had submitted along with its PQB, certificates issued by the Visakhapatnam Port Trust dated 12.10.2001, by the Visakhapatnam Steel Plant, by the Jindal Vijayanagar Steels dated 12.8.2004, by the Marmugao Port Trust dated 13.8.2004 and by the Chennai Port Trust dated 18.8.2004. Subsequently the 1st respondent received certificates from the Visakhapatnam Port Trust dated 19.10.2004 from M/s Poompuhar Shipping Corporation Ltd., dated 18.10.2004 and from India Cements Ltd, dated 18.10.2004.

The certificates submitted by the 2nd respondent along with PQB mentioned above, do not certify to any colliery liasoning experience of the 2nd respondent. Similarly among the certificates received by the 1st respondent latter, the Visakhapatnam Port Trust certificate dated 9.10.2004, the Poompuhar Shipping Corporation Ltd., certificate dated 8.10.2004 also do not mention about any colliery liasoning experience of the 2nd respondent. The India Cements certificate dated 18.10.2004 submitted after the opening of the PQB on 25.9.2004 certifies the 2nd respondent as having been entrusted the order to supply "imported Indonesian Steam Coal in bulk"

from Indonesia by delivery at Chennai Port Trust and that the supply includes procurement of coal. The certificate of M/s Kamal Wineries dated 23.7.2003 submitted along with PQB, certifies that the 2nd was appointed by M/s Kamal Wineries to move the coal from Singareni Collieries by liasoning with various agencies such as Coal Controller, Railways, Coal field staff and by close monitoring of loading coal at the pit heads. The 1st respondent categorically asserts in paragraph-8 of its counter affidavit (WP No.21080/04), that the certificate of M/s Kamal Wineries was not taken into consideration for pre-qualifying the 2nd respondent. The initial certificate from India Cements Ltd., dated 23.8.2004 submitted by the 2nd respondent along with PQB also does not certify to any collieries liasoning experience of the petitioner.

In paragraph-9 of the Writ Petition (21080/04) it is specifically pleaded that the certificate of M/s Kamal Wineries does not establish the colliery experience of the 2nd respondent and that the petitioner's enquiry revealed that the coal requirement of M/s Kamal Wineries is very meagre and would not support the eligibility of the 2nd respondent in this area. The same objection has been reiterated in this petitioner's letter to the 1st respondent dated 9.11.2004. The 3rd respondent in this writ petition had also addressed the 1st respondent by a letter dated 28.9.2004 contending that the documents submitted by the 2nd respondent reveal that they do not have any experience in collieries liasoning. None of the other certificates submitted by the 2nd respondent either along with its PQB or thereafter, as placed for perusal of this court, certify collieries liasoning experience of the 2nd respondent.

To the specific pleading in para-9 of the writ petition (21080/04), the 2nd respondent in para-10 of its counter affidavit glosses over the petitioner's assertion that the documents submitted by the 2nd respondent do not certify its colliery liasoning experience by merely stating that in terms of the tender notification, the 1st respondent had evaluated the over all experience, expertise and financial capability to execute the tender work and after scrutiny included the 2nd respondent as one of the qualified bidders for the price bid evaluation.

Respondents 1 and 2 as per their counter affidavits and the contentions urged at the Bar rested their defence to the asserted ineligibility of the 2nd respondent in respect

of colliery liasoning experience, on substantially two premises: (a) that on an over all consideration of the 2nd respondent's experience, expertise and financial capability to execute tender work, the 1st respondent was satisfied with the eligibility of the 2nd respondent and had shortlisted it as one of the 4 qualified tenderers at the post-PQB stage; and (b) that clause-6 of the PQB requirements set out in Part-I of the tender specification permits the 1st respondent to assess the tenderers' capacity to perform the contract, notwithstanding anything in the preceding clauses of the PQB requirements, should the circumstances warrant such an assessment, in the over all interests of the 1st respondent.

It requires to be presumed that the 1st respondent could not have known that the 2nd respondent's price bid would eventually be the lowest among the 4 shortlisted tenderers, who are parties in these writ petitions. While evaluating the PQB the only legitimate component that could inform the discretion of the 1st respondent as to the eligibility of the tenderers would be their eligibility *qua* the PQB requirements with regard to technical and financial qualifications, experience and the like. Both in the eligibility criteria specified in the 1st respondent's letter dated 26.8.2004 as well as Cl.10 of the PQB requirements "experience in liasoning with collieries" is specified as an additional experience requirement. Such experience of liasoning with collieries was considered by the 1st respondent as essential and mandatory by employing the conjunctive "and" after specification of the previous experience requirement of handling similar work of the specified minimum quantity of coal per annum.

In the absence of any explication, either in the counter affidavit of the 1st respondent or in the minutes of the 39th Board meeting of the 1st respondent dated 6.11.2004, that the 1st respondent had sensitised itself as to this mandatory experience requirement and was yet satisfied that either the 2nd respondent did have the colliery liasoning experience or that the lack of any certification to establish this requirement of the 2nd respondent was not fatal to the 2nd respondent's eligibility, the 1st respondent ought not to be permitted to abdicate its administrative obligation to ensure compliance by all the tenderers with the PQB requirements, on the specious plea that a wide discretion is available to the 1st respondent under the presents of Cl.6 of the PQB requirements. The discretion conferred on the 1st respondent under

Cl.6 supra, is not an uncanalised discretion. True it is that the preceding clauses of the PQB requirements could be eschewed by the 1st respondent while exercising the right to assess a tenderer's eligibility to perform the contract, but in deciding to eschew even mandatory requirements, the 1st respondent is required to establish that it was rationally satisfied that the circumstances of a particular tenderer justified the exercise of discretion (to ignore the lack of colliery liasoning experience) in the over all interests of the 1st respondent. Why, on 25.9.2004 (on opening the PQB) and even before the opening of the price bids, the 1st respondent was satisfied that the 2nd respondent was eligible, this court is unable to fathom. The respondents 1 and 2 offer no explanation.

The 1st respondent is a public authority exercising power in relation to public contracts which constitute largesse of the State and involve eventually a draw on the public exchequer. The tender specification of the 1st respondent that the bids should be in 2 parts – the PQB and the Price Bid, signal a conscious policy choice by the 1st respondent that a mere competitive price bid is not the sole or defining criteria in the choice of a contractor. Experience and technical qualifications adequate and essential to perform the complex sequential operations involved in the contract, are relevant criterion and are specified as PQB requirements, in order to shortlist the tenderers to choose among them the most competitive bid.

The Supreme Court in ***Poddar Steel Corporation vs Ganesh Engineering Works and Others()*** has reiterated the principle earlier enunciated by the Supreme Court in ***G.J.Fernandez vs State of Karnataka()*** with regard to classification of tender requirements into two categories – (a) those which lay down the essential conditions of eligibility and (b) other requirements which are merely ancillary or subsidiary to the main object to be achieved by the condition. The Supreme Court reiterated the principle that in the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon strict literal compliance with the condition, in appropriate cases. In ***Poddar Steel Corporation*** case (1 supra) the relevant clause of the tender notification required that the tender be accompanied by earnest money at a specified percentage of the offer to be deposited by cash or DD drawn on the SBI. Instead the appellant sent a certified cheque of the Union Bank of India drawn on its own branch and not on the SBI, which was however accepted by the Indian

Railways. The High Court held that in view of this defect the Railways had no power to accept the appellant's tender. Reversing, the Supreme Court ruled that the submission of a certified cheque of the Union Bank of India drawn on its own branch must be treated as sufficient for the purpose achieving the object of the condition. The Supreme Court held that literal compliance of every term of the tender notice was not required. Presumably, the Supreme Court in this case classified this tender notice requirement as being an ancillary or subsidiary condition and therefore substantial compliance therewith was held adequate.

Again in ***Kanhaiya Lal Agarwal vs Union of India and Others()*** the Supreme Court reiterated the principle spelt out in *Fernandez's* case (3 supra) that when an essential condition of a tender is not complied with it is open to the person inviting the tender to reject the same and that if the non-fulfilment of the requirement resulted in rejection of the tender, then it would be an essential term of the tender and otherwise only a collateral term. Logically, this principle cannot be understood to mean that whether a condition of a tender is an essential or collateral one depends conclusively on whether the person inviting the tender accepts or rejects the tender on non-compliance with a specific condition. When the person inviting the tender is a public authority, which in the matter of inviting tenders and their processing is obligated to comply with the *Viteralli* principle, it is axiomatic that the question whether a particular condition of tender is an essential one or merely a collateral one, must depend not on how the public authority deals with the condition but on an assessment of the character of the condition (as essential or ancillary) on empirical, holistic and objective standards. If the condition is one intrinsically related to the assessment of the capacity of a tenderer to fulfil the contractual obligations under the contract then the condition would be an essential condition and both the tenderer as well as the public authority would be bound to scrupulously adhere to the condition and the fulfilment of such condition would be mandatory. Even where a discretion is conferred, by the terms of the tender notification, on the public authority to overlook even an essential condition of a tender, for instance on an over all assessment of the capacity of the tenderer to fulfil the contractual obligations or in the over all interest of the public authority (as in the case of the discretion available to the 1st respondent under Clause-(6) of the PQB requirements), the public authority (R-1) is required to establish that the limits within which the discretion to ignore an essential condition have been spelt out, have been adhered, while arriving at a satisfaction that an

essential condition could be dispensed with in case of a particular tenderer.

In ***Tata Cellular vs Union of India()*** the Supreme Court on a broad analysis of a number of precedents and opinions of learned authors of Texts and Articles on the principles governing the contracts of public authorities, summarised the scope of judicial review and enunciated the principles as under:

" (1) The modern trend points to judicial restraint in administrative action.

(2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

I n ***G.B.Mahajan vs Jalgaon Municipal Council()*** Venkatachaliah, J (as His Lordship then was) defined the concept of reasonableness in administrative law by reiterating what was stated by Prof. Wade in the Treatise on Administrative Law :

" The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended. Decisions which are extravagant or capricious cannot be legitimate. But if the decision is within the confines of reasonableness, it is no part of the courts' function to look further into its merits. 'With the question whether a particular policy is wise or foolish the court is not concerned; it can only interfere if to pursue it is beyond the powers of the authority' …"

The Viteralli Principle:-

I n ***Viteralli vs Seaton ()*** Justice Frankfurter spelt out the well settled rule of administrative law as under:

> *" An executive agency must be rigorously held to the standards by which it professes its action to be judged … Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed . . . . This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword."*

This principle was accepted in a number of decisions in our Republic including in ***A.S.Ahluwalia vs State of Punjab(); Sukhdev vs Bhagatram() and R.D.Shetti vs International Air Port Authority().***

When the 1st respondent specified the eligibility criteria as including the experience of liasoning with collieries, it must be presumed that the 1st respondent was conscious that such experience was a relevant and essential criterion for assessing a tenderer's eligibility to perform the contract having regard to the fact that procuring coal from the collieries at Mahanandi effectively, is a critical component of the contract. The collieries liasoning experience criterion must therefore be considered an essential and mandatory condition. The 1st respondent on the application of **Viteralli principle** cannot be permitted to eschew this condition even without a demonstrable application of mind as to whether the over all experience of the 2nd respondent was so overwhelming or compelling as to permit ignoring this condition, in the over all commercial interests of the 1st respondent and at the PQB stage when the 1st respondent did not have even an inclining that the price bid of the 2nd respondent would be the lowest. From the documents on record, the pleadings of respondents 1 and 2 or the contentions urged on behalf of these respondents, this court is unable to arrive at the satisfaction that the 1st respondent had rationally evaluated the eligibility of the PQ Bids, in particular of the 2nd respondent *qua* the collieries liasoning experience criterion specified in the tender.

I n ***AIR INDIA LTD. VS. COCHIN INTERNATIONAL AIRPORT LTD., AND OTHERS()*** the Supreme Court reiterated the following principles with regard to the law relating to award of contract by the State or its instrumentalities:

' The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision making process and interfere if it is found vitiated by malafides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene.

The factual matrix in which the above principles were reiterated in Cochin International Airport Ltd., (COCHIN) (supra) require to be noticed. COCHIN a public sector undertaking was established for setting up and maintaining a new international Airport at Cochin. For awarding a contract for ground handling facilities at the new Air port it invited offers by writing letters to some Companies having experience in the area including Air India the National carrier and six others. Some of the agencies responded including Air India and Cambatta and submitted their proposals. The committee constituted by COCHIN for evaluation of offers, at its meeting, found that Air India, Cambatta and two others were equal as regards the relevant parameters and that Cambatta and Air India are Indian organizations operating mainly in the country and had better proven capability for operating in Indian conditions. The committee recommended Cambatta for awarding the work. While so, the Government of India wrote to the Government of Kerala recommending Air India for award of the contract on the ground of it being the National carrier with better experience. Eventually, despite the objections of Cambatta as to the preference being shown to Air India, COCHIN was persuaded to award the contract to Air India. Aggrieved, Cambatta filed a writ petition in the Kerala High court. A learned single judge found no illegality, arbitrariness or unreasonableness in the decision-making process of COCHIN and dismissed the writ petition. Cambatta carried the matter in an appeal and a Division Bench of the Kerala High Court allowed the appeal on the ground that the action of COCHIN was, inter alia, arbitrary and illegal. Aggrieved thereby, Air India, appealed to the Supreme Court. On a

scrutiny of the decision making-process of COCHIN for evaluation of the offers, the Supreme Court concluded that COCHIN committed no error in considering the fact that Air India being a National Carrier could be in a position to bring in more traffic of Air India and other domestic airlines if it was awarded the contract. The Apex Court reasoned that the merits of rival offers should not appropriately be looked at only as regards the financial aspect and that in a commercial transaction of a complex nature what may appear to be better on the face of it, may not be so considered when an overall view is taken and that the Court must defer to the decision of the party awarding contract. The Supreme Court held that on the basis of the material placed on record, COCHIN must be considered as having arrived at the bonafide belief that involving a Public Sector undertaking and the National carrier would, in the long run, prove to be more beneficial to COCHIN. On the above premise, the appeal of the Air India was allowed and the decision of the learned Single Judge of Kerala High Court confirmed, while setting aside the judgment of the Division Bench of Kerala High Court.

The principles governing judicial review of Government tender processes again fell for consideration of the Supreme Court in ***WEST BENGAL STATE ELECTRICITY BOARD VS. PATEL ENGINEERING CO.,& OTHERS().*** After quoting with approval the principles enunciated in ***Tata Cellular*** case(3rd supra), the Supreme Court restated the importance of maintaining the sanctity and integrity of tender processes and adherence even by the Governmental agency with the tender conditions. The Supreme Court held:

> *" The controversy in this case has arisen at the threshold. It cannot be disputed that this is an international competitive bidding which postulates keen competition and high efficiency. The bidders have or should have assistance of technical experts. The degree of care required in such a bidding is greater than in ordinary local bids for small works. It is essential to maintain the sanctity and integrity of process of tender/bid and also award of a contract. The appellant, respondents 1 to 4 and Respondents 10 and 11 are all bound by the ITB which should be complied with scrupulously. In a work of this nature and magnitude where bidders who fulfil pre-qualification alone are invited to bid, adherence to the instructions cannot be given a go-by by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and our constitutional values. The very purpose of issuing rules/instructions is to ensure their enforcement lest the rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under the ITB, by the State or its agencies(the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair*

the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided. Where power to relax or waive a rule or a condition exists under the rules, it has to be done strictly in compliance with the rules. We have, therefore, no hesitation in concluding that adherence to the ITB or rules is the best principle to be followed, which is also in the best public interest."

Though the above principles were spelt out by the Supreme Court in a case involving International Competitive Bidding, these principles being seminal and fundamental in their application to the contracts of all public authorities are applicable to the instructions contained in the tender specifications of the contract in the case on hand.

The discretion vouchsafed to the first respondent in clause-(6) of the PQB requirements of the tender specification to eschew all or any of the preceding conditions in the PQB requirements, is not an uncanalised discretion. The discretion though occurring in a tender condition, is a discretion conferred on a public authority-the first respondent. Such discretion is intended to sub-serve a compelling State and public interest.

At the time of scrutiny of the pre-qualification bids, when the first respondent could not be presumed to have knowledge of the price bids of the tenderers, the first respondent could have legitimately exercised its discretion under clause-6 of PQB requirements (to ignore the otherwise mandatory requirement that every tenderer should have collieries liasoning experience) only on a rational satisfaction that a specific tenderer capacity to perform the contract is compelling and in the overall interests of the 1st respondent it could legitimately overlook the specific requirement (that only such tenders as contained the full information and comply with the requirements regarding technical and financial qualifications, experience and equipment will be considered). Such limitation, on the otherwise facially broad discretion inhering in the first respondent under clause-6 of the PQB requirements, is compelling, in order to harmonize such discretion with the invariable principle evolved by the Supreme Court that the sanctity and integrity of the tender process and scrupulous adherence by the governmental agency with the essential and mandatory conditions of a tender notice, is inviolable.

What overall interests of the first respondent or what compelling Governmental interests are served by qualifying the 2nd respondent for the price bid at the PQB

stage (notwithstanding that there was no certificate substantiating the second respondent's collieries liasoning experience), is discernable either from the counter-affidavit, the minutes of the 39th Board meeting or in any document produced on behalf of the first respondent, for the perusal of this Court. The breezy assertion in the minutes of the 39th Board meeting of the first respondent that the Board expressed its full satisfaction about the experience, technical qualifications and eligibility of the second respondent on examination of its experience certificates or the assertion in the counter-affidavit of this respondent that as its expert body was satisfied with the pre-qualification of the second respondent such satisfaction is conclusive, does not immunize the first respondent from its obligation as a public authority and an instrumentality of the State to justify the exercise of its discretion even under clause-6 of the PQB requirements. In view of the challenge in these writ petitions as to the pre-qualification of the 2nd respondent, the 1st respondent is required to State as to how it was satisfied either that the second respondent had the collieries liasoning experience or despite lack of such experience acceptance of the 2nd respondent's PQB is in the over all interests of the first respondent. This obligation of the first respondent has not been fulfilled in this case.

This Court is not constituted an appellate authority over the decision of the first respondent either with regard to award of the contract in question to any of the four short listed tenderers or on the aspect as to whether the tenderers had qualified at the PQB stage. Nor is this court empowered or qualified to substitute its own decision on these aspects, to the decision of the expert evaluation of the first respondent. This Court however has the Constitutional and jurisdictional obligation to rule whether the standards laid down by the first respondent have been followed by it before clearing the tenderers at the PQB stage. If the first respondent has erred in scrupulously following the limits to its discretion spelt out even in clause-6 of the PQB requirements or has transgressed such other inherent and implied limitations as operate on it, in view of its character as an instrumentality of the State, this Court would be compelled to enforce the standards which the first respondent has held out as the basis on which it would evaluate the several bids received by it. Such scrutiny by this Court would constitute a judicial review of the first respondent's decision making process and not an appellate scrutiny of the decision of the first respondent with regard to the qualifying of the second respondent at the PQB stage. The discretion of the 1st respondent under clause-6 of the PQB requirements is a

discretion of a public authority, incorporated to sub-serve a public purpose. It is not in the nature of an irreviewable or absolute prerogative.

In West Bengal State Electricity Board's case m (12 supra) the Supreme Court held that where the power to relax or waive a rule or condition exists under the Rules, it has to be done strictly in compliance with the rules. In the case on hand, in 1st respondent is reserved the right to assess the 2nd respondent's capacity to perform the contract notwithstanding non-fulfilment of one or more of the PQB requirements (vide C.6 of the PQB requirements), should the circumstances warrant such an assessment in the over all interests of the 1st respondent.*(emphasis)* The discretion conferred on the 1st respondent is thus subject to an assessment that acceptance of the PQB of the 2nd respondent is in the over all interests of the APGENCO. There being no material as to the 2nd respondent's collieries liasoning experience, the 1st respondent is required to record in some document, even if it be an internal document of the 1st respondent, that in the considered view of the 1st respondent the acceptance of the PQB of the 2nd respondent is in the over all interests of the said respondent. The 1st respondent has not placed any such decision recorded, before this court.

On behalf of the 2nd respondent reliance is placed on the decision of the Supreme Court in ***Raunaq International Ltd., vs IVR Construction Ltd., and Others ()*** in support of a contention that in the mater of grant of Government contracts and Public Interest Litigation challenging such grant, the court must weigh the consequences including whether any relaxation was granted for bona fide reasons, the tender conditions permit such a relaxation and whether the decision arrived at is for a legitimate reason on fair consideration of all the offers. If such be the fact the court should hesitate to intervene, held the Supreme Court. the public detriment such as cost escalation, delay of essential public works and the like factors must also enter the judicial calculus when considering a challenge to the contracts of public authorities, held the Supreme Court in this case. These are all salutary principles that are compelling in any judicial review of the contracts of public authorities. Having regard to the large number of decisions enunciating principles with regard to judicial review of the contracts of public authorities, no single decision could be considered as a complete code of all the governing principles in this area. The

conspectus of all the principles enunciated in various decisions must however be borne in mind, by a court while adjudicating upon this area. The ultimate test is however the public interest that is served by the contracts of public authority including vital organic interests like equal access to all eligible citizens to such contracts, effective and timely execution of the works and the need to structure the discretion of public authorities in the matter of awarding contracts in conformity with the principles evolved by the public authority for evaluating the tenders. The safeguarding of the exchequer either from machinations of cartel forming bidders or from incompetent bidders quoting unrealistically low rates are equally compelling factors of public interest, which the public authority must consider. The Court must be satisfied that the public authority has so considered the relevant factors when a challenge is presented to it.

On the above analysis and to conclude, this court holds that:

A. The decision of the 1st respondent in calling upon the 2nd respondent to furnish documentary evidence of its *"coal loading into ships and transportation of coal by ships"* experience, is neither incompetent, *mala fide* nor suffers from any infirmity;

B. The 2nd respondent is not disqualified to bid for the contract on account of the fact that it was a sub-contractor of the petitioner in WP No.21080/04 in respect of the Visakhapatnam Port Trust work;

C. The satisfaction arrived at by the 1st respondent that the 2nd respondent had the rail-cum-sea-cum-rail prior experience of the specified magnitude, is valid; and

D. The 1st respondent was legitimately satisfied that the 2nd respondent had the experience in transportation of coal by ships and was thus eligible to tender.

However, the material on record in these writ petitions, considered in the light of the assertions of the 1st respondent in its counter affidavits, demonstrates no colliery liasoning experience of the 2nd respondent. As the 1st respondent states that it has

not taken into consideration the Kamal Wineries Ltd., certificate furnished by the 2nd respondent, there is no other certificate either filed or pleaded that establishes the collieries liasoning experience of the 2nd respondent. How the 1st respondent was satisfied that acceptance of the PQB of the 2nd respondent serves the overall interests of the 1st respondent, even though the 2nd respondent did not have the colliery liasoning experience, has also not been stated by the 1st respondent. Since in the considered view of this court colliery liasoning experience is an essential condition of the terms of the tender and normally binding on the 1st respondent as well, unless the 1st was satisfied that eschewing this requirement in so far as the 2nd respondent is concerned, is nevertheless compellingly to the benefit of the 1st respondent, this court is of the view that the 1st respondent should again address and specifically itself to this issue and record reasons at the level of the tender processing committee of the Board of the 1st respondent as the case may be, as to why the PQB of the 2nd respondent should be accepted.

In the 1st respondent's counter it is asserted that there was material for it to infer that the writ petitioners and the 3rd respondent (WP No. 21080/04) might have formed a cartel to jack up the rates in this contract. The petitioners on the other hand contended that the 2nd respondent did not have the colliery liasoning experience and the 1st respondent failed to adequately consider this aspect. Either or both of these factors, if true, would be prejudicial to the interests of the 1st respondent and public interest as well.

Both on the first principles as well as the tender conditions, the 1st respondent is adequately empowered to call for fresh bids, should it be satisfied that a cartel was formed or otherwise proceeding with the tender process is detrimental to its interests. It is thus not as though the 1st respondent is compelled to compromise on the qualifications or experience of the bidders including at the PQB stage, to overcome the consequences of the alleged cartelisation threat from a few of the short-listed bidders.

In any event the 1st respondent is required to rationally address itself on the colliery liasoning experience component and to record its specific decision on this aspect even within the ambience of its powers u/Clause 6 of the PQB requirements. This

the 1st respondent has not done. This the 1st respondent must do as a public authority. It would subserve transparency and accountability if the present officers of the 1st respondent leave a record for succeeding administrators as to why a particular decision was taken which was at least facially not in consonance with an essential condition of the tender. Recording of reasons (however brief or succinct) contributes to the long-term interests of the 1st respondent and acts as a check on any propensity to nepotism, arbitrariness or negligence in the matter of awarding of contracts by the 1st respondent – an instrumentality of State.

This court has held hereinabove that the non-recording of reasons by the 1st respondent is in error. This conclusion is arrived at in the factual circumstances of this case. As the pre-qualification of the 2nd respondent without documentary proof of its colliery liasoning experience requires a specific satisfaction of the 1st respondent, in view of the tenor and language of clause 6 of the PQB requirements and neither any document or pleading of the 1st respondent has established such conscious and rational satisfaction of the 1st respondent, this court has directed a review and recording of reasons.

This should not be understood as laying down the principle that in all contractual situations, a public authority is required to record reasons for evaluating the bids at the PQB stage or for awarding of a contract. When challenged the public authority is however required to establish rational and fair consideration of all the bids and when there is material to infer such consideration, the requirements of administrative law are satisfied. These requirements have not however been satisfied by the 1st respondent in this case. The direction in this case is issued in the circumstances.

Accordingly, the writ petitions are disposed of directing the 1st respondent to review the PQB bids of the 4 short-listed tenderers (who are parties in these writ petitions), record reasons for accepting the pre-qualification bids wherever any essential condition of the tender conditions (including the colliery liasoning experience condition) has not been established by any of the bidders and only thereafter proceed further in the matter of considering their price bids. The 1st respondent shall review the PQBs with the necessary expedition.

The writ petitions are disposed of as above. There shall however be no order as to

costs.

Date:18.01.2005 ----------

Pvsn Justice G.Raghuram

..... REGISTRAR

To

1. The Superintending Engineer/Generation-II

A.P. Power Generation Corporation Limited, (APGENCO)

Vidyut Soudha, Khairatabad, Hyderabad.

2. Two CCs to the learned Advocate General, High Court buildings, Hyderabad.
(OUT)

3. 2CD copies